FOR ARGUMENT

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Supreme Court, U.S.
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No. 91-687

In The

Supreme Court of the United States

October Term, 1992

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The
Montana Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

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RESPONDENT'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION IS VIOLATED BY COMPELLING HIM TO SUCCESSFULLY COMPLETE A SEXUAL OFFENDER PROGRAM BECAUSE ANY ADMISSION OF PAST CRIMINAL ACTS MAY GIVE RISE TO ADDITIONAL CRIMINAL CHARGES.

Respondent argued in his response brief that his Fifth Amendment Right against self-incrimination was violated when the court compelled him, as a condition of his probation, to successfully complete the sexual offender program where an admission of guilt was a prerequisite to acceptance. As Respondent previously set forth in his brief, the basis for this violation is that additional criminal charges could be brought against him for perjury, as well as that any possibility of acquittal in a new trial based on the witness's recantation, would be virtually non-existent.

It has since been brought to the attention of Respondent, from the decision in a recent case before the Montana Fifth Judicial District Court in Jefferson County (*State v. Drummond,* Cause No. 1365), that he could also be charged for any past criminal sexual activities, which he would be required to reveal as a condition of the treatment program.

In *Drummond,* following his conviction of sexual intercourse without consent, the Defendant was ordered to complete the sexual offender treatment program before he could be eligible for probation or parole. During the course of his participation in the sex offenders treatment program, he revealed past sexual offenses against children. Pursuant to a program requirement that participants divulge any past offenses and undergo polygraphs

to determine if they are withholding any information, a participant is forced to disclose any past illegal sexual activity in order to remain in the group. At the civil proceeding, in which the victim's parents sought damages, the defendant admitted that the criminal charges were true, in order to comply with his therapy. Thereafter, he was charged with perjury, for claiming, under oath, at his initial criminal trial that he had not committed the offense, with which he was charged.

In addition, the prison psychologist reported the incident of alleged incest, which Drummond had confessed to him, to the Department of Family Services, who in turn reported it to the County Attorney, as mandated by law. Section 41-3-201 (1), Montana Code Annotated states:

> **Reports.** (1) When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected, they shall report the matter promptly to the department of family services or its local affiliate, which then shall notify the county attorney of the county where the child resides.

Subsection (2)(b) includes, *inter alia*, "any other health or mental health professional."

As a result of the psychologist's report, the County Attorney charged Drummond with the crime of sexual assault. Thereafter, defendant's attorney moved the court for a protective order barring the prison psychologist's testimony in the upcoming trial. The Judge ruled that communications made concerning sexual offenses against children in the course of court ordered sexual offender

treatment were not privileged. This ruling is in direct violation of a Defendant's Fifth Amendment privilege against self-incrimination.

In the Judge's order, he conceded that, "while the Court perceives possible abridgment of self-incrimination and due process rights," the Defendant has "waived any such rights when he participated in the sex offender program, when he knew or at least should have known the consequences." As the defense attorney so aptly told the Judge, "this places the Defendant in a 'Catch-22' position." The Defendant either complies with the conditions of the sexual offenders treatment program and incriminates himself or he is not allowed to participate in the program at all. If the defendant is precluded from participation, he is deprived of the opportunity for probation or parole. However, the cost to society is of paramount consideration. Because the convicted sex offender receives absolutely no treatment, once he is released, he is more likely to re-offend.

The irony here lies in the fact that a person was charged with both perjury and criminal charges in the very same jurisdiction in which the State perceived this type of threat to be speculative and unrealistic. It would seem that the State is attempting to ride the fence on this issue. On one hand, it argues that any future charges are unlikely. However, in an actual situation in which the defendant took the step that Imlay refused to take, and incriminated himself, both charges of perjury and criminal charges were brought.

In light of this new information, Respondent is even more firmly convinced of the potential repercussions of

waiving his Fifth Amendments Right against self-incrimination. Therefore, the decision of the Montana Supreme Court should be upheld.

Respectfully submitted,

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